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In the

Supreme Court of the United States

October Term, 1977

No. 77-1301

Gannett Co., Inc.,

Petitioner,

v.

The Honorable Daniel A. DePasquale,
as Judge of the Seneca County Court,
et al.,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS AMICUS CURIAE

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INTEREST OF AMICI*

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization of approximately 250,000 members. The New York Civil Liberties Union is its state-wide affiliate. Since their creation nearly sixty years ago, the ACLU and the NYCLU have been dedicated to the cause of personal liberty through a vigorous defense of the safeguards embodied within the Bill of Rights.

The present case raises issues of particular interest to the ACLU and NYCLU because it involves an apparent, although we believe misconceived clash between two fundamental civil liberties concerns. On the one hand, the ACLU and NYCLU have long asserted the paramount importance of a free press. Thus, in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), the ACLU participated as amicus curiae urging the invalidity of a prior restraint in the context of an ongoing criminal proceeding. Likewise, the NYCLU has actively litigated the question of public access to judicial hearings. Matter of Oliver v. Postel, 30 N.Y. 2d 171, 331 N.Y.S. 2d 407 (1972). On the other hand, the ACLU and NYCLU have long supported the right of every criminal defendant to a fair trial before an impartial tribunal. The ACLU therefore joined in Sheppard v. Maxwell, 384 U.S. 333 (1966), urging that the petitioner had been deprived of his Sixth Amendment right to a verdict untainted by prejudicial publicity. This historic commitment to both sides of the

*Letters of consent from all parties to the filing of this brief are being filed with the Clerk of the Court.

"free press - fair trial" debate places amici in a unique position to aid the Court in balancing these critical constitutional values.

QUESTIONS PRESENTED

Did the Court of Appeals correctly hold that a trial judge in a criminal trial of considerable local interest could constitutionally exclude the public from a pretrial suppression hearing without a particularized showing of likely and substantial prejudice to the defendants, without a finding that other methods of preventing prejudice would have been ineffective, and with the burden on the excluded members of the press to show a "genuine public interest. . . outweigh[ing] the risks of premature disclosure"?

STATEMENT OF THE CASE AND POSITION OF AMICI

On July 19, 1976, Wayne Clapp, a former policeman in a small upstate New York community near Rochester, was reported missing by the local news media after his bullet-ridden boat was discovered adrift in Seneca Lake. An unsuccessful search to uncover his body was promptly begun. Three days later, two youths, ages 16 and 21, were arrested in Michigan and charged with the crime. At the time of the arrest, front page articles reported that each of the defendants had made incriminating statements and that one of the defendants had led the police to the spot where he had buried Clapp's stolen revolver.

On November 4, 1976, a hearing was held on defendants' motion to suppress both their confession and the physical evidence discovered in Michigan. At the start of the hearing, defense counsel moved to exclude the public and the press, claiming only that evidentiary matters would be revealed "which may or may not be brought forth subsequently at trial." That request was orally granted by the trial judge without requiring the defendants to demonstrate the likelihood of prejudice if the hearing were open and without exploring the possibility that one of the procedural devices suggested in Sheppard v. Maxwell, 384 U.S. 333, 361-362 (1966), might be adequate to protect defendants' fair trial rights. On appeal, this lower court order was upheld by a divided New York Court of Appeals which ruled that whenever a criminal case has aroused some public interest, pretrial hearings should presumptively be closed at the defendant's request unless the members of the press or the public seeking access to the proceedings can show that "the magnitude of any genuine public interest . . . outweigh[s] the risks or premature disclosure." p. 9.

Amici respectfully suggest that this presumption in favor of closed judicial hearings is flatly inconsistent with our entire constitutional tradition. As this Court has observed on numerous occasions, the press and the public have a right to observe the judicial process at work. The decision to close the doors of the courthouse is an extraordinary step which can only be justified if no other alternatives exist. In short, it is a last resort, not a first option. The failure of the Court

of Appeals to appreciate that fact compels reversal by this court.

ARGUMENT

The Decision Below, By Permitting Criminal Proceedings To Be Closed Absent An Extraordinary Showing Of Necessity, Infringes The Public's Right To Information About The Criminal Process In Violation Of The First, Sixth And Fourteenth Amendments.

This Court has long recognized that public scrutiny of the judicial process is an important safeguard of our liberty: "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." In re Oliver, 333 U.S. 257, 270 (1948). Public scrutiny is only possible, however, if the public is permitted to observe the judicial system in action and then freely discuss what has been observed. In Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), this Court protected the public's right to discuss judicial proceedings by holding that an extraordinary justification was required to sustain an order restraining the press from publishing information concerning a criminal case. See also Landmark Communications, Inc. v. Virginia, 46 USLW 4389 (May 1, 1978).

This case concerns the other necessary component of public scrutiny of the courts:

the right to observe judicial proceedings.* The order approved by the New York Court of Appeals in this case excluded the public and press from a pretrial suppression hearing in a murder case of grave public concern. It did so simply upon the request of the defendants, without any consideration of whether alternative means, less intrusive upon the vital constitutional interest in public information about the criminal process, would suffice to guarantee a fair trial.

In the view of the Court of Appeals, the only limitation on the discretion of trial courts to enter such orders is the provision of an opportunity for "interested members of the news media. . .to be heard . . .in a preliminary proceeding adequate to determine the magnitude of any genuine public interest [that] may be found to outweigh the risks of premature disclosure." 43 N.Y.2d at 381 (emphasis added). The standard applied by the Court of Appeals reverses the constitutional presumption in favor of open judicial proceedings and impermissibly treads upon the constitutional interest of the public and the press to information regarding the criminal justice system.

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*In Nebraska Press, this Court expressly reserved the question under what circumstances a trial court may constitutionally close criminal proceedings to the public in order to prevent the press and the public from obtaining information potentially prejudicial to a criminal defendant. 427 U.S. at 564 n. 8; cf. id. at 576 n. 3, 584 n. 11 (Brennan, J., concurring in judgment).

A. Closing pretrial suppression hearings to the public affects interests protected by the First and Sixth Amendments, and is therefore permissible, if at all, only when absolutely necessary to protect societal interests or individual rights of the highest importance.

The right of the press and the public to information about the functioning of the criminal courts is a basic constitutional right, protected by the First and Sixth Amendments, and essential to the proper working of a democratic government. As this Court has frequently recognized: "A trial is a public event. What transpires in the courtroom is public property." Craig v. Harney, 331 U.S. at 374.

1. The First Amendment

The free discussion of matters concerning judicial proceedings is a central concern of the First Amendment. When the press reports factual information about the operation of the judicial system, it "clearly serve[s] those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect." Landmark Communications, Inc. v. Virginia, 46 USLW at 4392. This Court has frequently emphasized how critical to the proper working of the democratic system envisioned in the First Amendment such public scrutiny of the judiciary is: "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

Recognizing the importance of free discussion about what transpires in the courtroom, this Court has repeatedly rejected the use of the contempt power to punish those whose public statements about judicial proceedings appear objectionable to those courts. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, supra; Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). Attempts to prohibit the reporting of what transpires in court or quasi-judicial settings have been no more acceptable. Landmark Communications, supra; Cox Broadcasting, supra. And no opinion of this Court has yet sustained a prior restraint intended to preclude discussion of the judicial process. Nebraska Press Association v. Stuart, supra; Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977).

The present case, however, is somewhat different from those earlier decisions. Here the New York courts have not sought to prevent the press from printing information already in its possession, or from reporting what transpires in open court. Rather, by closing the court they have sought to prevent the public and the press from acquiring information. At first glance, such action may appear to collide less directly with First Amendment interests than a direct "gag order". But upon reflection, it becomes clear that at least in this context the apparent dichotomy between gag orders and closure orders is more mirage than real.

In practical effect, the ability of the public to make informed decisions about political matters can be undermined as much

by the government's suppressing information as by government restraints on the dissemination of that information by private citizens who have acquired it. Specifically, when a court seeks to close judicial proceedings to members of the press, as in this case, it interferes with the right of the press "to report whatever occurs in open court through their respective media," Estes v. Texas, 381 U.S. 532, 541 (1965), every bit as effectively, and with every bit as much danger of suppressing "the beneficial effects of public scrutiny upon the administration of justice," Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 491, as if it had sought to enjoin the press from printing information already in its possession.* In fact, such an order is far more sweeping, since it prevents any member of the public or press from observing the functioning of the judicial process, and thereby thwarts the public's right to information about the courts even more drastically and completely. The First Amendment interest at stake in this case is therefore as significant as in Nebraska Press.

Moreover, the significant First Amendment interest in public attendance at, and scrutiny of judicial proceedings is one which is rooted in our nation's history and

*As the dissenting judges below observed, it is somewhat artificial to assume "that the right to observe an otherwise public proceeding is severable from and of less value than the right to convey information about it." 43 N.Y. 2d at 384.

one which this Court has long recognized in its opinions. Thus, when this Court declared in Craig v. Harney, supra, that "[a] trial is a public event," 331 U.S. at 374, the Court could only have relied on the First Amendment value in free and robust debate about the administration of justice since the underlying litigation which gave rise to petitioner's contempt citation was a civil property action to which the Sixth Amendment's guarantee of a public trial did not and could not extend.

Indeed, this Court has always recognized that protecting the right of self-expression is only one of the purposes of the First Amendment. Equally important is the purpose of fostering democratic self-government by prohibiting restraints on the discussion of public affairs, Mills v. Alabama, 384 U.S. 214, 218 (1966); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936), including judicial matters. Landmark Commission, supra. See generally, Saxbe v. Washington Post Co., 417 U.S. 843, 861-863 (1974) (Powell, Jr., dissenting); A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). And as this Court has had frequent occasion in recent years to emphasize, the First Amendment therefore guarantees the right of the public to receive information as well as the speaker's right to impart it. First National Bank of Boston v. Bellotti, 46 USLW 4371, 4376 (April 26, 1978); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 764-765 (1976). See also Kleindeinst v. Mandel, 408 U.S. 753, 762 (1972).

It bears emphasis that to assert a First Amendment interest in open judicial proceedings is not to advance a claim of special privilege for members of the press to have access to places or events from which the general public is legitimately excluded. "The First Amendment generally grants the press no right to information about a trial superior to that of the general public." Nixon v. Warner Communications, Inc., 46 USLW 4320, 4326 (April 18, 1978). See also Houchins v. KQED, 46 USLW 4830 (June 26, 1978); Branzburg v. Hayes, 408 U.S. 665, 684-685 (1972). Rather, we maintain that the order of the New York courts in this case infringed a right of the public in general to scrutinize the judicial process.*

Amici recognize that under the decisions of this Court, the right of access to public information, unlike the right of free expression, is qualified. Thus, this Court has stated, in dictum, that the press and public may be excluded from such proceedings as "grand jury proceedings [and]

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*Of course, in most circumstances, it would be members of the press who would most actively seek enforcement of this right. As this Court has noted, "in a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations." Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 491.

our own conferences," and may even "be prohibited from attending . . . trials if such restrictions are necessary to assure the defendant a fair trial before an impartial tribunal." Branzburg v. Hayes, supra, 408 U.S. at 685 (emphasis added). And just a few weeks ago, this Court narrowly rejected a media claim of special access to prison facilities. Houchins v. KQED, supra.

At the same time, it is a significant fact that the very recent "right of access" cases arose in the prison context. See Houchins v. KQED, supra; Saxbe v. Washington Post, 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974). As the Court noted in Saxbe, "prisons are institutions where public access is generally limited," 417 U.S. at 849 (citations omitted). The same can hardly be said of this nation's courtrooms. Indeed, the explicit language of the Sixth Amendment, and this Court's opinions under the First Amendment, e.g. Craig v. Harney, supra, are expressly to the contrary.

Obviously, not all governmental functions must be conducted in the open; secrecy is sometimes necessary if they are to fulfill their purposes. Nevertheless, certain government activities have traditionally been conducted in public and are public by their very nature and must therefore, remain presumptively open to the public. As a distinguished Court of Appeals judge recently pointed out; "A decision by Congress or a state legislature to conduct all its business in secret would, I think, run afoul of the First Amendment. Similarly, a decision by the judiciary to conduct all its business in secret would not be immune

from First Amendment scrutiny." United States v. Cianfrani, F. 2d slip op. at 44 (3d Cir. Mar. 16, 1978) (Gibbons, J., concurring).*

The boundaries of that proposition are obviously uncertain in light of the Court's decision in Houchins v. KQED, supra. But it is not the boundaries which are at issue in this case. Rather, the decisive fact about this case is that it involves a criminal trial--an institution that not only has traditionally and necessarily been open to public scrutiny, and that performs its functions best in the light of public examination, but one that the Constitution specifically requires be conducted in the open.

2. The Sixth Amendment

The Sixth Amendment guarantee of a public trial in criminal cases is a fundamental principle of liberty. What this Court has called "[t]he traditional Anglo-American distrust for secret trials," In re Oliver, 333 U.S. at 268, is a long-standing aspect of our criminal justice system: its roots extend to the abolition of the Court of Star Chamber in 1641. Id. at 266. The importance of public scrutiny "as a

*In Cianfrani, the Pennsylvania affiliate of the ACLU took the position that a pretrial hearing could properly be closed if closure were necessary to protect from further invasion by disclosure the privacy of individuals who had arguably been the subject of illegal wiretapping. Without endorsing or disavowing that position, it is sufficient to note that similar interests are not involved in this case.

safeguard against any attempt to employ our courts as instruments of persecution" has long been recognized. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." Id. at 270.

Although the requirement to a public trial is primarily intended to protect the defendant, the defendant is not its sole custodian. The text of the Sixth Amendment states that "the accused shall enjoy" a public trial, and insofar as the purpose of the guarantee is to limit the abuse of judicial power, the defendant can be counted upon to invoke the Amendment's protection. Nonetheless, the overwhelming weight of authority, as the Court of Appeals recognized in this case, supports a broader view, holding that the public as well as the defendant may invoke the amendment's command. See, e.g., United States v. Cianfrani, supra; United States v. Columbia Broadcasting System, 497 F. 2d 102 (5th Cir. 1974); Matter of Oliver v. Postel, supra.*

Quite clearly, interests other than those of the defendant are protected by the requirement of public trials. These include education of the public about the nature of

*This Court has never had occasion to decide the issue. See, e.g., Nixon v. Warner Communications, 46 USLW at 4326 n. 19. But see Houchins v. KQED, 46 USLW at 4834 n. 32 (Stevens, J., dissenting); Singer v. United States, 380 U.S. 24, 34-35 (1965).

the judicial process, In re Oliver, supra, 333 U.S. at 270 n. 24; preservation of public trust in the fairness of the courts, United States v. Cianfrani, supra, slip op. at 15, 25; United States ex rel. Lloyd v. Vincent, 520 F. 2d 1272, 1274 (2d Cir.), cert. denied, 423 U.S. 937 (1975); the possibility that witnesses might learn of the trial and come forward to testify, In re Oliver, supra, 333 U.S. at 270 n. 24; the prevention of bias in favor of defendants resulting from corruption, Lewis v. Peyton, 352 F. 2d 791, 792 (4th Cir. 1965); and the right of the public to scrutinize the judicial process and to form its own conclusions about political issues affecting the judiciary,* United States v. Cianfrani, supra, slip op. at 15.

Moreover, issues might arise in a

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*In this regard, the First Amendment and Sixth Amendment serve overlapping purposes. Thus, the Sixth Amendment's guarantee of a public trial promotes the First Amendment interest in an informed citizenry. Correspondingly, the First Amendment interest in an informed citizenry requires open trials even in civil contexts where the Sixth Amendment does not apply. E.g. Craig v. Harney, supra.

trial, or in a pretrial suppression hearing,* that would be of significant public interest but that the defendant, the prosecutor, and

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*This Court has never considered whether the right to a public "trial" extends to pretrial hearings as well as to the trial on the merits. To hold that the guarantee is confined to the trial on guilt or innocence, however, would be to limit the protection of the Amendment, for both defendant and public, quite artificially. A pretrial suppression hearing like that in this case is often the critical stage of a criminal trial, cf. Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967), so that the defendant's interest in public scrutiny to assure fairness, and the public interest in preserving the appearance of fairness, are as great as at the trial on the merits; since disputed issues of fact are resolved at such a hearing by testimonial evidence, the possibility that new witnesses might come forward and the usefulness of public scrutiny as a check on perjury are equally great; and issues of public importance concerning the behavior of police officers and the costs and benefits of the exclusionary rule are aired only in such hearings. For these reasons, the lower courts have generally recognized that the right to a public trial extends to pretrial evidentiary hearings on suppression motions. See generally United States v. Cianfrani, supra, slip op. at 16-21, and cases there cited.

the court might each for their own purposes be content not to see revealed. In a case like this one, for example, the public has an important interest in observing the functioning of the exclusionary rule, both to evaluate the merits of proposals that the legislature alter the nature of that remedy, see Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting), and to inform itself about possible government violations of constitutional norms. United States v. Cianfrani, supra, slip op. at 20. Yet the defendant's interest in preventing public knowledge of possible incriminating evidence, and the prosecutor's interest in suppressing knowledge of government misconduct, can prevent public awareness of these facts unless the public has an independent right to observe the criminal process. The broad purposes of the public trial clause can only be achieved, therefore, if it is recognized that the public, as well as the defendant, has a constitutionally protected interest in maintaining the openness of the judicial process.*

This is not to say that all hearings must be open without exception. Certainly the case law would not support any such absolute position. Under limited circumstances

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*The United States Court of Appeals for the Third Circuit, in recognizing the public's Sixth Amendment right to observe criminal proceedings, expressly rejected the New York Court of Appeals' reasoning in this case as "unacceptable." United States v. Cianfrani, supra, F. 2d at n. 4.

the courts have upheld the discretionary authority of trial judges to exclude members of the public from portions of trials or pretrial hearings when some compelling reason for secrecy existed, even over the objection of the defendant. Portions of hearings have been closed, for example, to protect the safety of witnesses, United States ex rel. Smallwood v. La Vallee, 377 F. Supp. 1148 (EDNY), aff'd, 508 F. 2d 837 (2d Cir. 1974), cert. denied, 421 U.S. 920 (1975), to maintain the integrity of government precautions to forestall hijackings, United States v. Clark, 475 F. 2d 240 (2d Cir. 1973), and to protect trade secrets, Stamicarbon N.V. v. American Cyanimid Co., 506 F. 2d 532 (2d Cir. 1974). Where the courts have taken such a drastic step, however, they have universally recognized "that any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity," Bennett v. Rundle, 419 F. 2d 599, 607 (3d Cir. 1969) (en banc), and that "any order of exclusion must extend no further than the circumstances strictly warrant in order to meet the asserted justification for closure." United States v. Cianfrani, F. 2d at , slip op. at 27. See also United States v. Ruiz-Estrella, 481 F. 2d 723, 725 (2d Cir. 1973).

We agree with the Court of Appeals that the need to preserve a defendant's right to a fair trial before an impartial jury uncontaminated by prejudicial pretrial

publicity* is as important, if not more important, than the other interests that have been held to justify exclusion of the public from criminal proceedings in appropriate circumstances. But the importance of the interest allegedly served by judicial secrecy is only one of two factors which must be weighed in the balance before an order closing the courtroom can even be contemplated. The availability of alternative and less drastic remedies must also be considered in light of the strong constitutional presumption in favor of area proceedings. In this case that inquiry was never made. As a result of that failure, and the impermissibly lenient standard which they applied, the New York courts in this case permitted the vital constitutional rights of the press and public under the First and Sixth Amendments to be infringed although no real threat existed to the defendants' fair trial right which could not have been dealt with by other means.

B. In approving the unnecessary exclusion of the public and the press from the suppression hearing in this case, the Court of Appeals applied an erroneous standard which failed to consider alternative means of protecting defendants' rights without infringing the public's.

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*This right derives from the Sixth Amendment, and from the due process clauses of the Fifth and Fourteenth Amendments. See, e.g., Irwin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965).

Given the nature of he public's constitutional right to observe the operation of the criminal courts, the exclusion of the public and press from criminal proceedings should be a last resort, "tested by a standard of strict and inescapable necessity." Bennett v. Rundle, supra, 419 F. 2d at 607. Therefore, before a court undertakes to exclude the public because of the possible prejudicial impact of material that may be the subject of suppression hearings, it must assure itself that an actual danger of such prejudice exists, and that it cannot be averted by less drastic means. Cf. Nebraska Press, supra.* The New York courts completely

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*In contrast to the holding of the Court of Appeals in this case, other courts have recognized that Nebraska Press also provides the appropriate standards for determining the propriety of closing pre-trial proceedings or court records to public scrutiny. Keene Publ. Co. v. Keene District Court, 380 A. 2d 261 (N.H. 1977) (pretrial hearing); Northwest Publications v. Anderson, 259 N.W. 2d 254 (Minn. 1977) (court records). Similarly, the Legal Advisory Committee on Fair Trial and Free Press of the American Bar Association, citing Nebraska Press, recommended that the ABA Standards Relating to Fair Trial and Free Press (1968), which had permitted exclusion of the press and public from pretrial hearings, be changed to forbid such closure unless there is shown "a clear and present danger to a fair trial in that:

> 1. There is a substantial likelihood that information prejudicial to the accuser's right to a fair trial would reach potential jurors; and

failed to do so in this case, and the opinion of the Court of Appeals, by setting a standard that encourages trial courts to close suppression hearings almost as a matter of course, assures that they will continue to do so in the future.

The trial judge in this case initially closed the suppression hearing to the public simply at the request of the defendants, finding only that "certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants." When petitioner appeared by counsel and moved the court to vacate the order, the judge found "a reasonable probability of prejudice to the defendants" and stood by his earlier order. No specific findings were made concerning the extent of the likely publicity for whatever information was expected to be revealed, the likelihood that such publicity would reach and prejudice potential jurors, or, most significantly, the possibility that the devices suggested by this Court in Sheppard v. Maxwell, supra, would adequately

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(fn. cont. from p. 19)
2. The prejudicial effect of such information on potential jurors cannot be avoided by alternative means. . . ."

ABA Legal Advisory Committee on Fair Trial and Free Press, Draft Standards Relating to Fair Trial and Free Press 3.1, at 6-7 (August 1, 1977).

protect the defendants' interests.*

The opinion of the Court of Appeals is even more cavalier in its disregard of the public's right to information about the operation of the courts. Strongly implying that the trial court has an obligation not "to allow public disclosure of potentially tainted evidence," 43 N.Y. 2d at 380, that court held that "where press commentary on pretrial suppression hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public." Id. This presumption may be overcome only if "the magnitude of any genuine public interest [is] found to outweigh the risks of premature disclosure." Id. at 381.

The standards announced by the Court of Appeals are fatally defective in at least two ways. First, by insisting that pretrial hearings be opened only upon a showing of extraordinary interest in a particular case, the Court of Appeals ignores the public's constitutionally protected interest in observing and learning

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*The Court of Appeals' comment that the county court had "determin[ed] that open suppression hearings, if exposed to notoriety, would have deprived [the defendants] of any meaningful opportunity to receive a fair trial" represents, even in its conditional form, a considerable overstatement of the trial court's actual findings.

about the judicial process in every case. That interest compels that trials be normally open. Because it fails to give appropriate weight to the public's right to information about the functioning of the criminal courts, the Court of Appeals completely reverses the appropriate presumptions. Trials should be presumptively open unless the necessity of closing them to protect the defendants is proven, not, as the Court of Appeals held, presumptively closed at defendant's mere request unless the public demonstrates a peculiarly compelling interest in a particular case. The Court of Appeals stands virtually alone in failing to recognize that a defendant seeking a closed hearing bears a heavy burden or proof of likely prejudice. See, e.g., Phoenix Newspapers v. Jennings, 107 Ariz. 557, 490 P. 2d 563 (1971); Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904 (Fla. 1977); State v. Lewis, 353 So. 2d 703 (La. 1977); State v. Allen, 73 N.J. 132, 373 A. 2d 377 (1977).

Second, rather than demanding a rigorous showing of the necessity for closing the hearing if the defendants' rights are to be protected, cf. Nebraska Press, supra, the court entirely fails to allow for the possibility that alternate means for protecting the defendant's rights might be found. Here again, the Court of Appeals sets itself against the many courts and commentators that have recognized the importance of determining whether alternatives to closing pre-trial hearings would suffice to protect defendants without sacrificing First and Sixth Amendment rights. Keene Publishing Co. v. Keene District Court, supra; State ex rel. Dayton

Newspapers v. Phillips, 351 N.E. 2d 127 (Ohio 1976); see also ABA Legal Advisory Committee on Fair Trial and Free Press, Draft Standards Relating to Fair Trial and Free Press, 2, 6-7 (August 1, 1977). In particular, the court appears to rule out the possibility of a change of venue. Yet the facts of this very case demonstrate the possibility that a change of venue can accommodate the public's right to know and the defendant's right to a fair trial. Indeed, the case would appear a classic one for a change of venue: because the victim was known only locally, the case was rather notorious in the immediate vicinity but caused hardly a ripple of interest in other parts of the State. Even in Sheppard v. Maxwell, supra, where this Court was faced with a barrage of pretrial publicity far in excess of anything shown here, Justice Clark observed:

> Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another country not so permeated with publicity. [Id. at 363-364.]

As we have pointed out, we do not seek a rule that pretrial suppression hearings always be opened to public scrutiny, regardless of the interest of the state or the defendant. On the other hand, to permit closure in accordance with

the lenient rule set forth by the New York Court of Appeals trespasses upon the public's interests in open proceedings. The standards for closing courtrooms that best protect the public's right without endangering the defendant's rights are analogous to those this Court announced in Nebraska Press.

At the outset, it is essential to emphasize, as the Court of Appeals did not, that the right of the public to access to the courts is of constitutional dimension, and not to be interfered with lightly. Therefore, it is to be presumed that all significant aspects of a criminal trial shall be conducted in the open. "It is only under the most exceptional circumstances that [even] limited portions of a criminal trial may be even partially closed." Stamicarbon N.V. v. American Cyanimid Co., supra, 506 F. 2d at 542.

Respect for this important constitutional interest requires that closure be permissible only after a court makes three critical findings. First, in order to close a pretrial hearing, the trial court must find a significant likelihood that, because of the notoriety of the case and the prejudicial nature of the evidence likely to be offered at a suppression hearing, an open hearing could impinge upon the defendant's right to a fair trial. It should be noted that the wide dissemination of even highly prejudicial material will not always interfere with a defendant's rights. See e.g. Murphy v. Florida, 421 U.S. 794 (1975).

Second, and it is here that standards set by the Court of Appeals are most deficient, the court must inquire "whether

measures short of an order [closing the hearing to the public] would have insured the defendant a fair trial." Nebraska Press, supra, 427 U.S. at 563. In this case, for example, it seems clear that a change of venue would have been sufficient to preserve the defendants' rights. In other cases, a continuance to allow the case to fade from public memory, or a careful voir dire at the time of jury selection, have proved equally effective.* See Nebraska Press, supra, 427 U.S. at 563-564; Sheppard v. Maxwell, supra, 384 U.S. at 357-362; United States v. Silverthorne, 400 F. 2d 627, 635-640 (9th Cir. 1968).

Finally, the court must consider whether or not an order closing the pretrial hearing would effectively prevent impairment of the defendant's rights. Cf. Nebraska Press, supra, 427 U.S. at 565-567. If, for example, the substance of the evidence to be introduced at the suppression hearing has already been made public, little purpose would be served by shielding the judicial response to that evidence from public scrutiny. Again, it would appear from the record in this case, that by the time of the suppression hearing the press had already reported defendants' confession and the

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*The availability of these alternate remedies negates any argument that closure is necessary to effectuate the purposes of the exclusionary rule. Incompetent and prejudicial evidence can be kept from the jury without any sacrifice of First and Sixth Amendment rights through the simple device of change of venue in those few cases where pretrial publicity is a serious problem.

fact that the police had been led to the victim's missing gun.

Under the proposed rule of the Court of Appeals, pretrial hearings in virtually any criminal case that attracts some publicity can be closed to the public, and the primary avenue through which the public can observe the costs and benefits of the exclusionary rule, and learn of the conduct of their public officials that often requires the exclusion of evidence, will needlessly be lost.* As we stated at the outset, pretrial proceedings should only be closed as a last resort in that rare criminal case where the defendant's right to a fair trial is genuinely and demonstrably threatened, and cannot be otherwise assured. If this simple rule is followed, then the rights of the defendant as well as those of the public will be fully guaranteed.

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*It is not a sufficient answer that suppression hearings in cases in which the public is not interested will remain open, or that under the Court of Appeals' opinion transcripts of the hearings will be available even in notorious cases after the trial is over. The beneficial effects of public scrutiny cannot be obtained if such scrutiny is allowed only in cases, or at times, in which a lack of interest indicates that little scrutiny will occur. This Court has in the past been particularly careful in reviewing restraints on the public's right to receive information that "produce their restrictive results at the precise time when public interest in

Taken together, the First and Sixth Amendments, mandate a system in which the press and the public are free to observe criminal trials, and then to report what they see and hear to the community so as to assure the "contemporaneous review in the forum of public opinion" that is the most effective safeguard against abuse of judicial power. In re Oliver, supra, 333 U.S. at 270. While pretrial proceedings may be closed to the public in the rare case where it is imperative to protect a defendant's right to a fair trial, the Court of Appeals in this case permitted exclusion of the public where no such necessity was shown, and its judgment must therefore be reversed.

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*(fn. cont. from p. 26)
the matter discussed would naturally be at its height." Bridges v. California, supra, 314 U.S. at 268. See also Mills v. Alabama, supra.

CONCLUSION

For the foregoing reasons, the decision of the New York Court of Appeals in this case should be reversed.

Respectfully submitted,

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